

Understanding FERPA

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an overview of the confidentiality rules that pertain to student records. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide educators with a working knowledge of the Family Education Rights and Privacy Act [“FERPA”]. The goal of this seminar is to equip educators with the tools necessary to ensure that they are able to comply with this federal law. The intent of this material is not only to teach to the minimal legal requirements but also to encourage educators as to the best practices in the area of FERPA compliance.

II. The Family Educational Rights and Privacy Act (“FERPA”)

A. Overview

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students¹ in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records.

FERPA is known as a “spending clause” statute enacted under the Constitutional authority of Congress to spend funds to provide for the general welfare. See U.S. Const. Art. I, Sec. 8. Simply put, recipients of federal funds are required to meet certain statutory requirements in order to receive the funds available under the applicable federal program. FERPA is an example of such legislation, imposing requirements on recipients of federal funds administered by the US Department of Education as a precondition to their receipt of such funds.

FERPA applies to any:

- State or local educational agency [“LEA”];
- Institution of higher education;
- Community college;
- School;
- Agency offering a preschool program; or
- Other educational institution.

School districts are considered “local educational agencies” and thus are subject to FERPA. FERPA does not apply to private and parochial schools that do not receive funding from the US Department of Education.

¹ When a student turns 18 years of age, the permission/consent requirements of FERPA, as well as the right to access records, and all other FERPA rights, transfer to the student; throughout these materials, this group of students is referred to as “adult students.” 20 USC 1232g(d). Unless otherwise noted, references to “parents” include references to “adult students.”

B. Defining an “Education Record” under FERPA

The intent of FERPA is to extend privacy and access rights to “education records.” Therefore, it is vital that the educator understand what constitutes an education record under FERPA.

The statute defines educational records as: “those records, files, documents, and other materials which:

- i. Contain information directly related to a student; and
- ii. Are maintained by an educational agency or institution or by a person acting for such agency or institution.”

20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. 99.3.

The term “record” means “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” 34 C.F.R. 99.3.

However, educational records do not include:

- i. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker and which are not accessible or revealed to any other person except a substitute;
- ii. Records maintained by a law enforcement unit of the school district that were created by that law enforcement unit for the purpose of law enforcement;
- iii. In the case of persons who are employed by a school district but who are not attending a school district, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose;
- iv. Records on a student who is 18 years of age or older, or is attending a college or other postsecondary institution, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and

which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;

- v. Records created or received by a school district after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; or,
- vi. Grades on peer-graded papers before they are collected and recorded by a teacher.

20 U.S.C. 1232g(a)(4)(B) (emphasis added); 34 CFR 99.3.

1. Records of a Law Enforcement Unit

For purposes of FERPA, a "law enforcement unit" is "any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency to:

- i. Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or
- ii. Maintain the physical security and safety of the agency or institution.

A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student."

34 C.F.R. 99.8(a).

Records of a law enforcement unit "means those records, files, documents, and other materials that are - -

- i. Created by a law enforcement unit;
- ii. Created for a law enforcement purpose; and,

- iii. Maintained by the law enforcement unit.”

Such records do not include “records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or [r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.”

34 C.F.R. 99.8(b).

C. Rights of Parents and Adult Students

FERPA enumerates a number of rights that Parents and adult students have with regard to student records. This section discusses those rights and how they are actualized.

1. The right to inspect, review and access education records

Simply put, parents have the right to inspect and review the education records of their children. When the information in the record pertains to more than one child the parent has the right “to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.” 20 U.S.C. 1232g(a)(1)(A). The privacy rights of other students are implicated in these circumstances, and the District is required to redact the names and other personally identifiable information about other students that may be included in the child’s education records. As a matter of best practice, student records should be generated in a manner which, to the extent possible, keeps the records student specific.

The regulations require that when a parent makes a request to inspect and review his or her child’s education records the District must provide the parent with access within 45 days of the request. 20 U.S.C. 1232g(a)(1)(A); 34 C.F.R. 99.10(b). The best practice however, is not to delay disclosure. When a parent has made a request, the District should promptly allow access.

The right of access includes the right to request copies of education records. The District has a duty to provide copies to parents, but may charge a reasonable duplication fee for those copies, so long as the fee does not “effectively prevent” a parent from obtaining the copy. However, the District may not charge a fee to search for or to retrieve the education records. 34 C.F.R. 99.11.

2. The right to challenge the content of education records

A parent/adult student has the right to challenge the content of their education records. 20 U.S.C. 1232g(a)(2); 34 C.F.R. 99.20.

Upon receipt of a challenge, the District has a choice:

- To agree to amend the record within a reasonable time after receiving the request; or
- To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If, after hearing, the information in the record is not found to be inaccurate, misleading, or otherwise in violation of the privacy rights of the student, the District is required to offer the parent the right to place a statement in their child's record, which will be kept and disclosed with the record in question. 34 C.F.R. 99.21. A District that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

3. The right to consent to the disclosure of education records

The parent/adult student retains the right to consent to the release/disclosure of education records and to consent to the disclosure of personally identifiable information contained in educational records (other than directory information, as discussed below). 20 U.S.C. 1232g(b).

Personally identifiable information includes, but is not limited to:

- The student's name;
- The name of the student's parent or other family members;
- The address of the student or the student's family;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. 99.3.

FERPA creates a general presumption that a school district **may not release** the **education records, or personally identifiable information** contained in educational records, of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of **directory information** and the concept of certain **exceptions to the prior written consent rule**.

Directory information is defined as information that a district may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- electronic mail address;
- photograph;
- date and place of birth;
- major field of study;
- grade level;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;
- dates of attendance;
- degrees, honors, and awards received; and,
- the most recent educational institution attended.

20 U.S.C. 1232g(a)(1)(5)(A); 34 C.F.R. 99.3; see also RSA 189:1-e (authorizing local educational agencies to provide information designated as directory information

consistent with FERPA, and defining directory information as “information not generally considered harmful or an invasion of privacy if disclosed,” which “may include: name and address of a student; field of study; weight and height of athletes; most recent previous school attended; date and place of birth; participation in officially recognized activities and sports; and, date of attendance, degrees, and awards”).

Directory information does not include a student’s social security number. 34 C.F.R. 99.3.

In order for a District to be free to release directory information without prior written consent, the District must provide public notice of the areas of information that it has designated as “directory information,” and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent. 20 U.S.C. 1232g(a)(1)(5)(B); 34 C.F.R. 99.37.

The No Child Left Behind Act (“NCLB”) addresses the disclosure of directory information, such as student’s names, addresses, and telephone numbers to military recruiters, requiring, with some exceptions, such as parental refusal, that districts disclose this information to military recruiters. See 20 U.S.C. 7908.

There are twelve (12) relevant ***exceptions to the “prior written consent” rule.*** 20 U.S.C. 1232g(b); 34 C.F.R. 99.31(a). They are as follows:

- 1. Other school officials, including teachers within the local educational agency, who have been determined to have a legitimate educational interest in the information.**

Prior written consent is not required for disclosure of education records to teachers and other school officials who have a “legitimate educational interest” in reviewing the records. 34 C.F.R. 99.31(a)(1).

It is the school which makes the determination as to which educators have a “legitimate educational interest” in obtaining the records. The District must include “a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest” in its annual FERPA notification. 34 C.F.R. 99.7(a)(3)(iii).

- 2. Officials of other schools or schools systems in which the student intends to enroll.**

A district may release education records to other schools or school systems in which the student is enrolled or intends to enroll upon the following conditions:

- The district makes a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:
 - The parent or adult student requested that the records be disclosed or,
 - The District’s annual FERPA notification includes a statement that it forwards education records to other agencies or institutions that have requested the records, so long as the disclosure is for purposes of the student’s enrollment.
- The parent or adult student receive a copy of the records, if desired; and
- The parent or adult student have an opportunity for a hearing to challenge the content of the record.

34 C.F.R. 99.31(a)(2); 34 C.F.R. 99.34. See also Academy 20 Sch. Dist., 114 LRP27950 (Colo. SEA May 1, 2014) (holding that a district did not violate FERPA by obtaining records (without parental consent) from school districts where a newly-enrolled student had previously resided because the student had transferred to the district).

The NCLB requires that the district have a procedure in place to ensure that disciplinary records pertaining to a student’s suspension or expulsion are transferred to any elementary or secondary school where the student is enrolled or intends to enroll.

3. Authorized representatives of the State Department of Education, the Attorney General of the United States, or State and local educational authorities.

State and local education officials have access to student or other records which may be necessary in connection with the audit of their programs. For example, state auditors may request student records in order to audit a state supported program. 34 C.F.R. 99.31(a)(3).

4. Financial Aid Officials.

This exception permits appropriate officials in connection with a student’s application for, or receipt of, financial aid to obtain education records, including a student’s social security number, so long as the disclosure is necessary to determine

the eligibility for the aid, the amount of the aid, the conditions for the aid, or enforce the terms and conditions of the aid. 34 C.F.R. 99.31(4).

5. Persons subject to a Subpoena or Court Order.

FERPA allows education records to be released pursuant to a subpoena upon condition that parents and adult students are notified in advance of compliance with the subpoena. This notification requirement does not apply if the subpoena is a Federal grand jury subpoena or if the subpoena has been issued for law enforcement purposes, and the court or issuing agency has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed. 34 C.F.R. 99.31(a)(9).

Districts are not required to provide parents with notice prior to disclosing the records if the disclosure is made pursuant to a court order in a proceeding involving child abuse or neglect, and the order is issued in the context of that proceeding. 20 U.S.C. 1232g(b)(2)(B).

6. Disclosure to State and local officials in connection with the state's juvenile justice system under specified conditions.

FERPA allows educators to share information verbally with organizations such as Child Protective Services agencies. 34 CFR 99.31(a)(5). For example, FERPA does not prohibit an educator from making a verbal report to the Division for Children, Youth and Family.

In addition, schools may receive and use information from law enforcement courts and other justice system components in order to provide services to students and to maintain a safe and effective learning environment. However, once the information is received and maintained by the school, it becomes subject to FERPA and the FERPA exceptions.

Educators are also permitted to make disclosure to state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication the student whose records are being released. For example, when a district has been joined by the court in a juvenile system it may share information with the court as part of the joinder and evaluation process.

It is also important to remember that information garnered by a school resource officer (under the "law enforcement unit" exception) is not considered an "education record," under FERPA. If, for example, a school resource officer creates a file and places a report in it pertaining to a school based investigation, a school resource officer

is entitled to share that information with a law enforcement unit or for that matter any other law enforcement unit.

7. Organizations conducting studies for educational agencies.

Organizations conducting studies for, or on behalf of educational agencies for purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and that such information will be destroyed once no longer needed. 34 C.F.R. 99.31(a)(6).

The district must enter into a written agreement with the organization, and the written agreement must: specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require that the organization use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require that the organization conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests; and, require that the organization destroy or return (within a specified time period) all personally identifiable information when it is no longer needed for the purpose for which the study was conducted.

8. Accrediting organizations.

Organizations which carry out accrediting functions are exempt from the prior written disclosure requirement. 34 C.F.R. 99.31(a)(7).

9. Parents.

Parents of dependent students as defined in the IRS Code are exempt from the prior written consent requirement by virtue of their status as the child's parent. 34 C.F.R. 99.31(a)(8).

10. Health or safety emergencies.

Appropriate persons in connection with a health or safety emergency are entitled to obtain education records if the knowledge of the information is necessary to protect the health or safety of the student or other persons. 34 C.F.R. 99.31(a)(10); 34 C.F.R. 99.36(a).

When making this determination, the district may "take into account the totality of the circumstances pertaining to the threat to the health or safety of a student or other individuals." If the district determines that there is "an articulable and significant threat

to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. 99.36.

In addition, FERPA does not prohibit schools “from including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.” 20 U.S.C. 1232g(h); 34 C.F.R. 99.36(b)(1)-(2).

11. The Patriot Act of 2001.

The USA Patriot Act of 2001 added a new subsection that allows the US Attorney General to apply for an ex parte order requiring an educational agency to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism, whether domestic or international. 20 U.S.C. 1232g(j).

12. Any agency caseworker or other representative of a State or local child welfare agency, or tribal organization, who has the right to access a student’s case plan, as defined by the State, when such agency or organization is legally responsible, in accord with State law, for the care and protection of the student.

The agency or organization is prohibited from disclosing the educational records, or the personally identifiable information contained in such records, except to an individual or entity engaged in addressing the student’s education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with State laws applicable to protecting the confidentiality of a student’s education records.

This provision is known as the “Uninterrupted Scholars Act.” 20 U.S.C. 1232g(b)(1)(L).

D. Record Keeping Requirements under FERPA

There is a mandated record keeping requirement with regard to FERPA. The school district is required to keep a log with the education records of each student which indicates:

- All individuals, agencies or organizations that have requested or obtained access to a student’s education records;

- The legitimate interest that each of the above has in obtaining the information.

In addition, if the information was disclosed due to a health or safety emergency, the record must also include:

- The articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure; and
- The parties to whom the school district disclosed the information.

34 C.F.R. 99.32(a).

The record of access is available only to parents and school officials responsible for custody of the records.

E. Penalties for Redisclosure by Third Parties

Personally identifiable information from covered records can only be transferred to a third party on condition that they will not permit any other person access to the records without the parent's written consent, unless redisclosure of the information would be permitted under one of FERPA's exceptions to the prior written consent rule. 34 C.F.R. 99.33(a)(1).

F. FERPA and HIPAA

The Health Insurance Affordability and Accountability Act of 1996 protects protected health information (PHI) from disclosure. When HIPAA was first adopted questions arose as to whether or not HIPAA applied to school districts. Student health records are "education records" subject to FERPA, and not HIPAA. See 24 CFR 164.501.

G. Electronic Consent

As indicated above, a school must have a signed and dated written consent prior to disclosing personally identifiable information from educational records. The written consent must:

- Specify the records that may be disclosed;
- State the purpose of the disclosure; and,

- Identify the party or class of parties to whom the disclosure may be made.

34 C.F.R. 99.30(b).

This written consent may “include a record and signature in electronic form that - (1) [i]dentifies and authenticates a particular person as the source of the electronic consent; and (2) [i]ndicates such person’s approval of the information contained in the electronic consent.” 34 C.F.R. 99.30(d).

Upon request, the district must provide the parent with a copy of the records disclosed. 34 C.F.R. 99.30(c).

H. Pertinent Decisions and Rulings Pertaining to FERPA

The Family Policy Compliance Office is the office primarily responsible for issuing opinions with regard to FERPA. These opinions provide guidance to the educator as to the interpretation of FERPA.

1. A Parent’s Due Process Rights Do Not Entitle Them to Access Records Regarding Other Children

In Letter to Attorney for School District, 40 IDELR 99 (FPCO October 31, 2003), an attorney asked for an official opinion as to whether FERPA permits a school district to release information in education records related to one student to the parents of another student. An impartial due process hearing officer had ordered that the parents be provided with a “complete and accurate copy” of their son’s disciplinary records which would include the names and other personally identifiable information of other students. The FPCO ruled that the IDEA did not trump FERPA and that the IDEA regulations did not give the parents a greater right of access to the education records belonging to other students simply because they were involved in a due process hearing.

2. FERPA Compliance in Proposed Survey of Children with Disabilities

In Letter to Lloyd-Jones, 41 IDELR 67 (FPCO 2004), the Compliance Office found that there was no FERPA exception that would allow the State Department of Education to disclose students’ personally identifiable information to the State’s Health Services Department. The Office further noted that nothing in FERPA prohibited the State Department or districts and schools from disclosing information in the aggregate or in another non-personally identifiable form. However, before making the disclosure, the agency would need to remove the students’ names, ID numbers and any personal characteristics that would make the child’s identity “easily traceable.”

3. The IDEA Also Protects Student Privacy

In Douglas County School District, 41 IDELR 258 (SEA CO 2004) the hearing officer ruled that a Colorado school district violated the IDEA when a principal made comments about a student's cognitive and social/emotional level to parents of another student. The investigating officer refused to consider whether the disclosure denied the child FAPE since such an allegation should be resolved at due process.

It is important to note that the IDEA also contains non-disclosure provisions which are based on the similar provisions of FERPA. 34 CFR 300.571(a)(1) (the IDEA regulation) generally requires parental consent before personally identifiable information contained in their child's educational records may be disclosed to anyone other than school officials.

In Greater Hoyt (SD) School Board, 20 IDELR 105 (FPCO 1993), the Compliance Office found that a district violated FERPA after it disclosed information contained in a student's "IEP Addendum" to the newspaper and at a board meeting. The IEP Addendum contained information such as: details stating that Student's parent would be reimbursed for 8 trips to visit student at an out of state school and information pertaining to reimbursement to the parents for the costs associated with the Student's placement. In making the disclosure, the district did not specifically name the student; however, the district disclosed enough "personally identifiable information" to enable a third party to identify the student. Thus, it was irrelevant that the student's name was not released.

4. Untimely Disclosure of Records Could Expose a District to a Claim of Denial of FAPE

In Council Rock School District, 41 IDELR 204 (SEA PA 2004), the hearing officer rejected a claim by the parents that the district's failure to provide a timely and complete set of educational records pertaining to their student amounted to a denial of FAPE. The Appeals Panel hearing the case concluded that, "the case law is overwhelming that procedural violations that are not prejudicial failed to establish denial of FAPE." The Panel acknowledged however that it was conceivable that a breach of FAPE could occur based solely on a records violation. The educator is best advised to diligently and timely disclose records to parents who request access.

5. OCR Does Not Have Jurisdiction Over Personal Privacy Claims

In Jonesboro Consolidated Community School District No. 43, 41 IDELR 99 (OCR, Chicago (IL) 2003), OCR issued a ruling explaining that it had no authority to address an allegation that a special education teacher discussed a child's disability and testing information with the child's neighbor. OCR noted that the privacy claim is best addressed by FERPA and directed the parent to contact the Family Policy Compliance Office.

6. Access to Records

In Letter to Segura, 113 LRP 7194 (FPCO Oct. 2, 2012), FPCO opined that:

- A school district is not required to provide a parent's attorney with access or copies of educational records in response to his or her request, and it is not required to respond to such a request within the 45 day time limit set by FERPA. This is because the attorney does not hold FERPA rights with regard to gaining access to the student's educational records and because FERPA does not require the district to provide copies of education records.
- Similarly, a district is not required to respond to a request for copies of, or access to, educational records received by any third party (other than the parent or eligible student), even if the request is accompanied by written parental consent.
- A district must comply with a request for access to records from a parent or eligible student within 45 calendar days of receipt of the request. This time period begins to run as of the date the district receives the request for access to records.

Similarly, in Letter to Tagg, 113 LRP 5521 (FPCO, Nov. 7, 2012), the FPCO opined that a school district is not required to provide the parents of a 22 year old student with access to the student's educational records. The student provided written permission to the school, authorizing disclosure of the records to student's parents, but the district refused. Parents claimed that the district was violating their rights under FERPA. FPCO investigated and found that the complaint was unsubstantiated. FPCO noted that once the student turns 18 years old or enters post-secondary education at any age, the school is only required to give the student access to the records. The school may give the parents access with written permission from the student, but they are not required to do such.

In Letter to Sheffels, 114 LRP 50793 (FPCO June 23, 2014), the FPCO found that a district had violated FERPA when it failed to provide a parent with access to educational records within 45 days. The parent requested access to records on September 3, 2013, but did not receive copies of the records until November 18, 2013. Thus, the district was required to provide assurance and evidence that staff had been trained regarding access to records under FERPA.

7. Non-Custodial Parents Have the Right to Access Records, Absent a Court Order Stating Otherwise

In contrast, in Letter to Lianides, 113 LRP 7159 (FPCO Oct. 9, 2012), the FPCO found in favor of a non-custodial parent who was denied access to her minor daughter's educational records. In that case, the student was in the custody of her paternal grandmother, who requested that the school prohibit both parents from accessing student's records. When the non-custodial parent requested access to the records, the district denied the request and the parent complained.

FPCO opined that the district should have provided the parent with access to the records. FPCO noted that schools are required to provide custodial and noncustodial parents alike with full rights under FERPA unless the school has been provided with evidence that there is a court order, state statute, or other legally binding document that specifically revokes these rights. The district was not provided with any of these documents, therefore, the district violated FERPA when it refused to provide the parent with access to the records.

8. Inadvertent Disclosure of Records

Letter to Fagan, 113 LRP 7161 (FPCO Oct. 9, 2012) addresses the inadvertent disclosure of records that were contained on a flash drive. A school attorney wrote to the FPCO requesting guidance as to whether a disclosure of records may have occurred when the flash drive could not be located.

FPCO opined that the district's response to the loss of an electronic data storage device from a classroom will determine whether it violated FERPA. The FERPA safeguarding recommendations recognize that no system is perfect and sometimes information will get out. FERPA does not dictate requirements for safeguarding education records, but the FPCO encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information.

Schools may use any reasonable method to protect the information. The FERPA Safeguarding Recommendations specify that an educational agency or institution that has experienced a theft of files should consider one or more of the following steps:

1. Report the incident to law enforcement authorities.
2. Determine exactly what information was compromised.
3. Take steps immediately to retrieve data and prevent any further disclosures.
4. Identify all affected records and students.
5. Determine how the incident occurred.
6. Determine whether institutional policies and procedures were breached.
7. Determine whether the incident occurred because of a lack of monitoring and oversight.
8. Determine steps that will prevent the incident from happening in the future.

9. Notify students of steps they should take if they believe their information was stolen.

Failure to take reasonable and appropriate steps to protect education records could result in the release or disclosure of personally identifiable information from education records and may constitute a policy or practice of permitting the release or disclosure of education records in violation of FERPA requirements. See also Letter to Lacey, 114 LRP 30849 (FPCO March 12, 2014).

9. Communications with Private Physicians

In Letter to Anonymous, 114 LRP 37980 (FPCO May 19, 2014), the FPCO found that a district did not violate FERPA after a guidance counselor spoke with a child's physician regarding records submitted by the parent.

In that case, the parent complained that the guidance counselor contacted the private physician and disclosed information from educational records, without parental consent. FPCO noted that the information provided from the parent and the school indicated that the guidance counselor called the doctor (in response to a letter from the doctor) to request clarification about the date he was recommending the student could return to school, and did not disclose any information other than information that was already in the letter.

FPCO noted that FERPA defines "disclosure" as "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, *to any party except the party identified as the party that provided or created the record.*" 34 C.F.R. 99.3 (emphasis added). Thus, FPCO concluded that FERPA would permit the guidance counselor to contact the doctor to verify the information that the doctor included in his letter.